For these reasons I think the appeal should be dismissed with costs.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Chung & Co.; Yin Ee Kheng; R. C. H. Lim & Co.*

NEW INDIA ASSURANCE COMPANY LTD. v. LEWIS

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Chua J.) October 18, 1966]

[Singapore — Federal Court Civil Appeal No. Y10 of 1966]

Contract — Insurance — Arbitration clause — Whether dispute as to existence of contract itself can be referred to arbitrator.

This was an appeal against the order of the High Court appointing an arbitrator under the terms of an insurance policy. The insurance policy which related to a horse was due for renewal. The insurance company required a veterinary certificate before the renewal of the insurance. The respondent sent the amount required for the renewal but did not send the veterinary certificate. The horse died. On a claim by the respondent the appellants argued that there was no policy in force and, therefore, there was no right to arbitration.

Held: the issue between the parties was whether the contract of insurance was in force at the time of the death of the horse and it is settled law that such an issue cannot go to arbitration under an arbitration clause in the contract.

Cases referred to:—

(1) *Heyman* v. *Darwins Ltd.* [1942] 1 All E.R. 337 at p. 343.

(2) *Toller* v. *Law Accident Insurance Society Ltd.* [1936] 2 All E.R. 952.

FEDERAL COURT.

G. S. Hill for the appellants.

L. A. J. Smith for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal against an order of Buttrose J. in an originating summons. The application was taken out by the respondent in this appeal for an order pursuant to section 8 of the Arbitration Ordinance, Chapter 10, that Denis H. Murphy, advocate and solicitor of Hongkong Bank Chambers, Singapore, or some other fit and proper person may be appointed to act as arbitrator under clause 10 of the conditions of an insurance policy No. H/618/10/0013/64 dated the 24th day of April, 1964, issued to the respondent by the appellants. Buttrose J. made an order in terms of the application.

The appellants on the 5th May 1964 issued a policy of insurance, covering against the risks specified therein, on a horse known as "Bonny Creeper", in consideration of the payment of a premium of $841. The period of insurance under the policy extended from noon on the 24th April 1964 to noon on the 24th April 1965. The policy contained an arbitration clause in the following terms:—

"10. All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company."

On 16th March 1965 i.e. prior to the expiry of the policy, the appellants sent a "renewal notice" to the respondent who then sent to the appellants $841 for the renewal of the policy. The appellants issued a receipt dated 22nd April 1965 for this payment and sent it with a letter dated 23rd April 1965 in the following terms:—

"Dear Sir,

Re: Renewal of Policy H/618/10/00131/64
Racehorse "Bonny Creeper" *alias*
Bacqlava II"

We thank you for your instructions to renew the above policy for one year from 24th April, 1965.

We shall be much obliged if you would forward us the enclosed veterinary certificate form duly completed by the veterinary surgeon to enable us to renew the policy."

Our temporary receipt for $841.40 is enclosed.

We would also request you to confirm that 'Bonny Creeper' has been renamed 'Bacqlava II'.

Since the policy is expiring on 24th April, 1965 kindly see that the veterinary report is forwarded to us without delay."

The horse "Bonny Creeper" died on the 30th April 1965 but, owing to circumstances which are not material for the purposes of the present proceedings, it was not examined by a veterinary surgeon between 23rd and 30th April 1965.

The respondent lodged a claim which the appellants denied on the ground that there was no policy in force in respect of the horse at the time of its death. The respondent took the view that at the material time there was in existence an insurance policy covering the horse having regard to the express provisions of the policy dated 5th May 1964, to the renewal notice sent by the appellants notifying him that his policy was due for renewal, to the payment by him of the premium of $841 and the acceptance of that payment. The appellants however took the view that the acceptance of the premium and the issue of a new policy was conditional upon their receipt of a certificate from a veterinary surgeon and as there was no such certificate which had been received by them at the material time there was no policy of insurance in respect of the horse.

It was clear therefore that the issue between the parties was whether or not on the 30th April 1965, when the horse died, there was a policy of insurance in force. The appellants said there was no policy in force whereas the respondent said there was.

Buttrose J. in a short judgment said:—

"I am of the opinion in this case that this is a matter which falls within the provisions of clause 10 of the policy of insurance and is a proper one for the decision of an arbitrator appointed thereunder."

The appellants contend that Buttrose J. was wrong in that until the issue whether or not there was a policy of insurance in force at all has been determined there can be no basis for the appointment of an arbitrator under the terms of clause 10 of the policy.

It is settled law that where the dispute is as to whether a contract, which contains an arbitration clause in the widest and most usual form such as "arising out of" or "under" or "with regard to" the contract, was entered into at all that issue cannot go to arbitration under the clause. The reason why such an issue cannot go to arbitration is because in the words of Viscount Simon L.C. in *Heyman* v. *Darwins, Ltd.*[1] at page 343 "the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission". In the words of Lord Macmillan, *ibid*, at page 345 "If there has never been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less."

Mr. Smith for the respondent contends, however, that clause 10 read with the policy itself, which provides that "if at any time during the period in the schedule or during any other period for which the company may accept payment for the renewal of this policy, any animal . . . shall die . . . then the company will . . . pay . . . the loss which the insured shall suffer . . .", is wide enough to give jurisdiction to the arbitrator in the circumstances of this case. The fallacy in that argument seems to me to be that it pre-supposes either that the appellants do not deny that there was a contract between the parties at the relevant date, or, if they deny it, that the court in the present proceedings could decide that issue and would decide it in favour of the respondent.

It seems to me that if the decision of Buttrose J. appointing an arbitrator is right, then, if the arbitrator found there was no contract in existence at all and no right to sue on the policy dated 5th May 1964 as at the material date, he would be deciding that the arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter. On the authority of *Toller* v. *Law Accident Insurance Society, Ltd.*[2] I am of the opinion that the order made by Buttrose J. cannot stand.

For all these reasons I would allow this appeal and set aside the order of Buttrose J.

Tan Ah Tah F.J. and **Chua J.** concurred.

Appeal allowed.

Solicitors: *Rodyk & Davidson; L. A. J. Smith.*

GOVERNMENT OF SINGAPORE v. KOH ENG KIAT

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Chua J.) October 18, 1966]

[Singapore — Federal Court Civil Appeal No. Y11 of 1966]

Practice and Procedure — Service outside jurisdiction — No leave obtained — Service in Malaysia — Courts of Judicature Act, 1965, s.7(2) — Republic of Singapore Independence Act, 1965, s.13.

The plaintiff (appellant herein) had commenced an action against the defendant (respondent) who resided in Malaysia. The writ was issued and served without first obtaining the leave of the High Court, by a process server of the High Court of Malaya, on the defendant's solicitors who accepted service on his behalf. A conditional appearance was entered and subsequently an application was made to set aside the service of the writ on the ground that the provisions of R.S.C., 1934, O. XI had not been complied with. The learned judge who heard the application set aside the service of the writ and the plaintiff appealed. The appellant contended that section 7(2) of the Courts of Judicature Act, 1964 of Malaysia which was in force in Singapore, expressly permitted all summonses respecting any case or matter within the jurisdiction of the High Court of Singapore to be served anywhere within Malaysia and therefore overrides the provisions of O. XI of the Rules of the Supreme Court.

Held: section 7(2) of the Courts of Judicature Act, 1964 must be so construed as to bring it into conformity with the Republic of Singapore Independence Act, 1965, and with the independent status of Singapore upon separation from Malaysia so as to limit its territorial scope to Singapore and therefore leave should have been obtained under O. XI of the Rules of the Supreme Court for the service of the writ in Malaysia.

FEDERAL COURT.

Wee Han Kim (State Counsel) for the appellant.

Goh Heng Leong for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering judgment of the court): The Government of Singapore commenced an action in the High Court of Singapore by way of a specially indorsed writ of summons against Koh Eng Kiat who resides in Malaysia, a foreign country, at No. 67 Jalan Templer, Petaling Jaya, Kuala Lumpur which was the address stated on the writ.